The Maramont Corp. *and* United Production Workers Union, Local 17-18; Eisner, Levy, Pollack & Ratner, P.C.; Local 132-98-102, Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies' Garment Workers' Union, AFL–CIO

United Production Workers Union, Local 17-18 (The Maramont Corp.) *and* Eisner, Levy, Pollack & Ratner, P.C. Cases 29–CA–16873, 29–CA–16883, 29–CA–17427, 29–CA–17468, 29–CA–17699, 29–RC–8044, and 29–CB–8833

June 30, 1995

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On April 28, 1994, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel, The Maramont Corp. (Maramont), United Production Workers Union, Local 17-18 (Local 17-18), and Local 132-98-102, Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies' Garment Workers' Union, AFL–CIO (ILGWU), each filed exceptions and supporting briefs. ILGWU filed an answering brief and a brief in opposition to Local 17-18's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision, Order, and Certification of Representative.

1. The judge found, and we agree, that Maramont violated Section 8(a)(5) and (1) of the Act by failing since July 1992 to remit to Local 17-18 dues withheld from employees' paychecks and to make contributions to the contractually established Welfare Fund. We also agree with the judge that Maramont unlawfully refused to bargain on request with Local 17-18 for a successor to the collective-bargaining agreement that was effective from November 20, 1989, to November 20, 1992.

2. We disagree, however, with the judge's findings that Maramont did not violate Section 8(a)(2) and (1) by continuing to recognize Local 17-18, and that Local 17-18 did not violate Section 8(b)(1)(A) by continuing to accept such recognition, after February 17, 1993.

The record shows that Maramont had for many years recognized Local 17-18 as its employees' exclusive representative for collective-bargaining purposes. Such recognition was embodied in a series of collective-bargaining agreements, the most recent of which was effective from November 20, 1989, until November 20, 1992. The contract contained, inter alia, a dues-checkoff provision. Beginning in July 1992, although it continued withholding dues from employees' pay, Maramont failed to remit the dues withheld to Local 17-18. The record also shows that even after the contract expired on November 20, 1992, Maramont continued withholding dues for Local 17-18 from employees' pay. It is undisputed, however, that Maramont never remitted any dues to Local 17-18 after July 1992.

On February 17, 1993, Maramont and Local 17-18 each received copies of a petition signed by 64 of Maramont's 118 unit employees,[2] stating that the signatory employees no longer wanted to be represented for collective-bargaining purposes by Local 17-18, that they were revoking their Local 17-18 dues-checkoff authorizations, and that they were resigning membership in Local 17-18.[3] Despite the November 20, 1992 expiration of the contract, and the February 17, 1993 employee petition, Maramont continued withholding dues from employees' pay at least through May 1993. In addition, Local 17-18's representatives had unimpeded access to Maramont's premises and employees from July 1992 at least through the June 4, 1993 election, and Local 17-18's representatives met with Maramont officials to discuss employees' grievances after the February 17, 1993 employee petition rejecting Local 17-18. Maramont also initiated bargaining with Local 17-18 in May and June 1993.

An employer is not privileged to continue recognizing a union as its employees' exclusive representative when the employer has objective evidence that the union no longer represents a majority of its employees.

[1] The Respondent Maramont has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to rely on the judge's personal views expressed in fns. 3, 5, and 9.

[2] Although the judge found it unnecessary to determine how many employees were in the bargaining unit, we find ample evidence in the record to conclude that there were 118 unit employees as of February 17, 1993. We note that the General Counsel and Maramont agree on the identity of 118 unit members, but that Maramont contends there were a total of 138 unit employees at the time the petition was delivered. We reject Maramont's contention; in so doing, we specifically rely on Maramont's payroll and timecard records which clearly show that the additional 20 employees Maramont named as part of the bargaining unit either worked in departments not historically included in the unit, were hired after February 17 or terminated before February 17, or were supervisory or salaried employees.

[3] The petition's statement was written in English, Spanish, and French.

We agree with the judge that there is no evidence that any of the 64 signatures were obtained by fraud, misrepresentation, or coercion.

Point Blank Body Armor, 312 NLRB 1097 (1993). An employer that recognizes a nonmajority union violates Section 8(a)(2) of the Act. Similarly, a union that accepts recognition, even though it has objective evidence of its actual loss of majority support, violates Section 8(b)(1)(A). Ibid.

Here, it is undisputed that Maramont and Local 17-18 each received the employee petition on February 17, 1993. At that time, both Maramont and Local 17-18 had knowledge that Local 17-18 had lost its majority status.

Local 17-18 contends that the February 17, 1993 employee petition was tainted by Maramont's unlawful refusal to bargain for a successor agreement and failure to remit dues and welfare fund contributions. We disagree. The Board considered the impact of those unfair labor practices when, on April 19, 1993, it authorized the Regional Director to proceed to an election in Case 29–RC–8044. The Regional Director believed that a fair election could be conducted because the pending unfair labor practice allegations were not the type that would substantially impair employees' ability to select a bargaining representative.[4]

Following the June 4, 1993 election, Local 17-18 filed objections, some of which paralleled the pending complaint allegations. On September 23, 1993, the Regional Director issued a Supplemental Decision on Objections and Notice of Hearing, inter alia, overruling Local 17-18's objections. Subsequently, Local 17-18 filed a request for review, which the Board denied on February 3, 1994. Thus, it is law of the case that these unfair labor practices did not interfere with employee free choice in the June 4, 1993 election. In these unique circumstances, we therefore cannot find that these same unfair labor practices tainted the employee majority's otherwise valid rejection of Local 17-18 as their collective-bargaining representative.[5]

Therefore, we find that after February 17, 1993, Maramont's continued withholding of Local 17-18 dues from employees' pay, its allowing Local 17-18's representatives unimpeded access to its premises and employees, its meetings to discuss employee grievances with Local 17-18 representatives, and its aborted attempts to bargain with Local 17-18 just before the June 4, 1993 election, constituted unlawful recognition of a nonmajority union in violation of Section 8(a)(2) and (1). Likewise, we find that Local 17-18 violated Section 8(b)(1)(A) by accepting recognition from Maramont when it was aware it was no longer the unit employees' majority representative.[6]

AMENDED REMEDY

Dues Payments

As stated above, the judge found, and we agree, that Maramont violated Section 8(a)(5) and (1) by failing since July 1992 to remit checked-off union dues to Local 17-18. As a remedy for this unfair labor practice, the judge provided that Maramont shall reimburse employees for any dues deducted. We disagree. Inasmuch as Local 17-18 was the employees' lawful collective-bargaining representative until February 17, 1993, we amend the judge's remedy to provide that Maramont shall remit to Local 17-18 all dues withheld from employees' pay during the period from July 1992, until February 17, 1993.

A different remedy is warranted with respect to dues withheld after February 17, 1993. Inasmuch as we have found that Maramont's continued withholding of Local 17-18 dues after February 17, 1993 constituted a violation of Section 8(a)(2) and (1), we shall order Maramont to return all such dues payments to the employees from whom they were withheld.

Fund Payments

We agree with the judge that Maramont must make all contractually required contributions to the Welfare Fund from July 1992 until June 4, 1993—the date of the election—but for different reasons. Until November 20, 1992, Maramont was required pursuant to its collective-bargaining agreement with Local 17-18 to make contributions to the Welfare Fund on behalf of em-

[4] The Regional Director noted to the Board that Local 17-18 had been the employees' bargaining representative for a number of years; that the relationship between Maramont and Local 17-18 was amicable; that the timing of Maramont's unfair labor practices was such that they just happened to block the ILGWU rival petition; that employees would not have been aware of the alleged unfair labor practices without Local 17-18 informing them; and that there was no evidence that Maramont was otherwise failing to abide by the collective-bargaining agreement.

[5] For the same reason, we disagree with the judge that Maramont's Sec. 8(a)(5) conduct constituted a withdrawal of recognition. Clearly, a withdrawal of recognition would have interfered with employee free choice. Here, however, the evidence shows that Maramont continued to recognize Local 17-18 by continuing to check off dues from employees' paychecks, including raising the amount checked off from $3 per week to $15 per month in accordance with Local 17-18's January 1993 dues increase. Further, as discussed above, Maramont gave Local 17-18's representatives continued access to its employees and premises, met with Local 17-18 representatives concerning employee grievances, and initiated bargaining with Local 17-18 shortly before the representation election.

[6] *Underground Service Alert*, 315 NLRB 958 (1994), is not to the contrary. The Board held there that, during the interval between an election and the certification of a union, an employer is not privileged to withdraw recognition based on an employee petition. The Board reasoned that a Board-conducted election is a far more reliable indicator of employee choice than an employee petition. *Underground Service Alert* is distinguishable because in the case at bar no Board election had been held when Maramont and Local 17-18 received the employee petition on February 17, 1993. Indeed, as of that time, processing of the election petition was blocked by the pending unfair labor practice allegations. See *Underground Service Alert*, supra at 961 fn. 8, distinguishing *Atwood & Morrill Co.*, 289 NLRB 794 (1988), on similar grounds.

ployees in order to provide health insurance coverage. After the contract expired, Maramont was required to maintain the employees' existing terms and conditions of employment until bargaining in good faith with Local 17-18 to impasse or agreement on a successor contract. *NLRB v. Katz*, 369 U.S. 736 (1962). As the judge found, Maramont refused to bargain with Local 17-18 on request; therefore, Maramont was obligated to continue making contributions to the Welfare Fund after November 20, 1992.

On February 17, 1993, when the employees rejected Local 17-18 as their collective-bargaining representative, Maramont's general obligation to bargain with Local 17-18 came to an end. Indeed, we have found above that Maramont's post-February 17, 1993 recognition of Local 17-18 violated Section 8(a)(2) and (1) of the Act. In prior 8(a)(2) cases, however, the Board has recognized that it would be contrary to the purposes of the Act to remedy that unfair labor practice with the issuance of an Order that on its face would penalize employees by depriving them of benefits previously provided, such as health care insurance. *Mego Corp.*, 254 NLRB 300, 301 (1981); *Hartz Mountain Corp.*, 228 NLRB 492, 562 (1977), enfd. 593 F.2d 1155 (D.C. Cir. 1978). In each of those cases, we ordered the employer to provide its employees with substitute coverage for the coverage that had been provided through the union benefit fund, so that no employee would be faced with termination of his or her coverage simply because the employer had violated the Act. We shall also do so here. In this case, it is not necessary to order Maramont to provide substitute coverage from February 17 until June 4, 1993, because it is undisputed that the Maramont employees were in fact provided with health benefit coverage by the Local 17-18 Welfare Fund during that period despite Maramont's continued failure to make fund payments. In the particular circumstances of this case, and recognizing our broad discretion to appraise the relevant factors that determine a just remedy, *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), we find that it will best effectuate the policies of the Act to order Maramont to pay for this coverage by reimbursing the Welfare Fund for the contributions Maramont failed to make until June 4, 1993, when the ILGWU won the election and the Welfare Fund ceased providing coverage. After June 4, 1993, the Respondent shall provide equivalent substitute coverage that shall not lapse or be discontinued until the Respondent reaches agreement on alternative health coverage or bargains to impasse with the ILGWU.

ORDER

The National Labor Relations Board orders that

A. The Respondent Employer, The Maramont Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain on request with any labor organization with which it has a lawful obligation to bargain under the National Labor Relations Act.

(b) Failing to remit union dues lawfully withheld from employees' pay.

(c) Failing to make contractually required contributions to the Local 17-18 Welfare Fund on behalf of bargaining unit employees.

(d) Recognizing United Production Workers Union, Local 17-18, as the exclusive representative of its employees for purposes of collective bargaining until that Union has demonstrated its majority status pursuant to a Board-conducted election.

(e) Withholding from employees' pay dues for a union that does not represent a majority of the bargaining unit employees.

(f) Implicitly threatening employees with the loss of their jobs if they vote for Local 132-98-102, Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies Garment Workers Union, AFL–CIO.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the union that is the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Remit to United Production Workers Union, Local 17-18 all dues withheld from bargaining unit employees' pay from July 1992, until February 17, 1993, plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Reimburse the bargaining unit employees for any money withheld from their pay as dues for United Production Workers Union, Local 17-18 after February 17, 1993, plus interest as set forth in *New Horizons for the Retarded*, supra.

(d) Transmit to the Local 17-18 Welfare Fund those contributions it failed to make on behalf of its unit employees from July 1992, to June 4, 1993, including any additional amounts due the fund, computed in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[7]

[7] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the

Continued

(e) Make whole bargaining unit employees for any expenses incurred by reason of the Respondent's failure to make contributions to the Welfare Fund, or by reason of the Respondent's failure to maintain an alternative health benefit coverage, in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), plus interest as set forth in *New Horizons for the Retarded*, supra.

(f) Provide an equivalent substitute to any insurance or indemnity coverage maintained by or through the Local 17-18 Welfare Fund so that no such coverage shall be discontinued or lapse until the Respondent reaches agreement on alternative health benefit coverage or bargains to impasse with Local 132-98-102, Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies Garment Workers Union, AFL–CIO.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(h) Post at its facility in Brooklyn, New York, copies of the attached notice marked ''Appendix A.''[8] Copies of the notice, in English, Spanish, and Haitian Creole, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent Union, United Production Workers Union, Local 17-18, Brooklyn New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the exclusive representative of the unit employees of Maramont for the purposes of collective bargaining unless and until the Respondent shall have demonstrated its majority status in a Board-conducted election.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its union office in Brooklyn, New York, copies of the attached notice marked ''Appendix B.''[9] Copies of the notice, in English, Spanish, and Haitian Creole, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Maramont Corp. at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 132-98-102, Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies' Garment Workers' Union, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Employer at its Brooklyn, New York facility, excluding all clerical employees, guards, professional employees, foremen and supervisors as defined in the Act.

Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[9] See fn. 8 above.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain on request with any labor organization with which we have a lawful obligation to bargain under the National Labor Relations Act.

WE WILL NOT fail to remit union dues lawfully withheld from employees' pay.

WE WILL NOT fail to make contractually required contributions to the Local 17-18 Welfare Fund on behalf of bargaining unit employees.

WE WILL NOT interfere with, restrain, or coerce you by recognizing United Production Workers Union, Local 17-18, as the exclusive representative of our employees for purposes of collective bargaining until that Union has demonstrated its majority status pursuant to a Board-conducted election.

WE WILL NOT withhold from our employees' pay dues for Local 17-18 or any other union that does not represent a majority of the bargaining unit employees.

WE WILL NOT implicitly threaten our employees with the loss of their jobs if they vote for Local 132-98-102 Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies Garment Workers Union, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed Section 7 of the Act.

WE WILL, on request, bargain with any union that is the exclusive collective-bargaining representative of our employees in an appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL remit to United Production Workers Union, Local 17-18 all dues withheld from our employees' pay from July 1992 until February 17, 1993, with interest.

WE WILL reimburse our employees for any money we withheld from their pay as dues for Local 17-18 after February 17, 1993, with interest.

WE WILL pay to the Local 17-18 Welfare Fund those contributions we failed to make on behalf of our employees from July 1992 to June 4, 1993.

WE WILL make whole any employees for any expenses incurred because of our unlawful failure to make contributions to the Local 17-18 Welfare Fund or by reason of our failure to maintain an alternative health benefit coverage.

WE WILL provide an equivalent substitute to any insurance or indemnity coverage maintained through the Local 17-18 Welfare Fund so that no such coverage shall be discontinued or lapse until the Respondent reaches agreement on alternative health benefit coverage or bargains to impasse with Local 132-98-102, Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies Garment Workers Union, AFL–CIO.

THE MARAMONT CORP.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT act as the exclusive representative of the unit employees of The Maramont Corp. for the purposes of collective bargaining unless and until we have demonstrated our majority status in a Board-conducted election.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

UNITED PRODUCTION WORKERS UNION,
LOCAL 17-18

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York City on various days from January 25 to March 8, 1994.

The charges in Cases 29–CA–16873, 29–CA–16883, and 29–CA–17427 were filed by Local 17-18 (the incumbent Union), respectively on September 29 and October 1, 1992, and June 17, 1993. A consolidated complaint was issued in the first two cases on April 3, 1993, and alleged:

1. That the Employer discriminatorily issued a suspension to employee John Sanchez because of his alleged activity on behalf of Local 17-18.

2. That the Employer refused to bargain with Local 17-18 for a new contract.

3. That the Employer failed and refused to remit union dues to the Union in accordance with the terms of a collective-bargaining agreement which expired on November 20, 1992.

4. That the Employer failed and refused to make contributions to a Health and Welfare Fund in accordance with the terms and conditions of the aforesaid contract.

On February 14, 1994, another complaint was issued in Case 29–CA–17327 (filed by Local 17-18), which was consolidated with the present proceeding. That complaint alleged:

1. That the Employer had deducted union dues from its employees but has retained them and failed to remit them to Local 17-18.

2. That alternatively the Employer's failure to remit dues was unlawful until either;

(a) The contract expired, or

(b) The date or dates (February 17 or June 4, 1993) when the employees signed and delivered a petition to the Employer and to Local 17-18 stating, inter alia, that they were revoking their dues-checkoff authorizations.

The charges in Cases 29–CA–17468 and 29–CB–8833 were filed against the Employer and the incumbent union, Local 17-18, by the law firm which represented the ILGWU. A complaint in those cases was issued on September 29, 1993, and alleges that the Employer and Local 17-18 continued to recognize and bargain with each other in violation of Section 8(a)(2) and 8(b)(1)(A) of the Act after they were notified that a majority of the employees in the bargaining unit no longer wished to be represented by that union. It is contended that this lack of majority status was demonstrated by the delivery of employee signed petitions on February 17, 1993.

The charge in Case 29–CA–17699 was filed by Local 132–98–102 of the ILGWU (for purposes of brevity called ILGWU), on October 5, 1993. The Regional Director issued a complaint based on this charge on November 19, 1993. This complaint, as modified at the hearing, alleged that on or about June 3, 1993, during a speech given on the day prior to the election, the Employer threatened to close or move its plant; threatened to withhold wage increases and other benefits; threatened to layoff employees and give their jobs to other persons; threatened to refuse to bargain with the ILGWU if they won the election; and promised raises to employees if they voted for Local 17-18.

The petition in Case 29–RC–8044 was filed by Local 132–98–102 of the ILGWU on September 11, 1992. (Note this was about 2 weeks before Local 17-18 filed its first unfair labor practice charge.) Notwithstanding the argument of Local 17-18 that its charge should block an election, the Regional Director issued a Decision and Direction of Election on April 22, 1993. In early May 1993 the Regional Director ordered that an election take place on May 21, 1993. Because the Employer initially refused to furnish a list of the eligible voters' names and addresses, however, in accordance with the rule in *Excelsior Underwear*, 156 NLRB 1236 (1966), it was necessary to postpone the election. After obtaining agreement from the Employer to furnish the required list, the parties agreed to hold the election on June 4, 1993.

The election was held on June 4, 1993, and a majority of the valid votes were cast for the ILGWU.[1] On June 8, objections were filed by Local 17-18 and on June 9, objections were filed by the Employer. On September 23, 1993, the Regional Director issued a supplemental decision in the representation case. In that decision, the Regional Director dismissed all the objections filed by Local 17-18 and dismissed one of the two allegations made by the Employer. The remaining objection on which he ordered a hearing, related to the employer's allegation that a representative of the ILGWU threatened to notify the Immigration and Naturalization Service against employees who did not vote for that union.

On the entire record, and in particular based on my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted and I find that the Company, a New York corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. BACKGROUND

For some number of years the Employer has recognized and bargained with Local 17-18. The last contract was executed on November 17, 1989, and ran for a term from November 20, 1989, to November 20, 1992. That contract provided for payments by the Employer to a Health and Welfare Fund which is supposed to provide medical benefits for the employees. The contract also contained a union-security and dues-checkoff clause pursuant to which employees are required to become members of Local 17-18 and pay dues to that organization.

The ILGWU began organizing the employees of Maramont in 1987 and filed a petition in Case 29–RC–6754 seeking an election. Over a period of time, the ILGWU and another union, Local 810 International Brotherhood of Teamsters, also filed a series of petitions seeking elections at a number of other companies that had contracts with Local 17-18. Many, but not all of those companies, had contracts with Local 17-18 through a multiemployer association called the Williamsburg Trade Association whose members were engaged in widely disparate businesses.

On February 19, 1993, almost 6 years after the petition had been filed in Case 29–RC–6754, the Board issued a decision at 310 NLRB 508 directing elections at various employers including Maramont. In so doing, the Board, among other things, rejected the contention that a multiemployer bargaining unit was appropriate. In the case of Maramont it determined that this employer had never been a member of the association and that it had signed an independent contract with Local 17-18. The Board noted that although the ILGWU may have filed its initial petition prematurely vis a vis the expiration date of Maramont's contract with Local 17-18, this would not preclude the holding an election at the company. Accordingly, the Board ordered that an election be held among the employees at Maramont, if after a reopened hearing, it was shown that the company met the Board's jurisdictional standards. (See fn. 2 of the Board's decision.)

In the meantime and unknown to the Board, the ILGWU filed the present petition in Case 29–RC–8044 on September 11, 1992, as it feared that its initial petition might be dis-

[1] ILGWU received 61 votes and Local 17-18 received 44 votes. There were four challenged ballots and one person voted against both unions.

missed under the Board's contract-bar rules requiring a petition to be filed 90 to 60 days before the expiration date of a company's contract with an incumbent union. As the new petition was timely filed vis a vis the November 20, 1992 contract expiration date, the ILGWU withdrew its previous petition and the Regional Director proceeded on this, rather than the petition that had been filed in 1987.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The charges in Cases 29–CA–16873 and 29–CA–16883 were filed by the incumbent Union, Local 17-18 about 2 weeks after the ILGWU filed its election petition. As noted above, Local 17-18 alleged that the Company discriminatorily suspended employee John Sanchez in violation of Section 8(a)(1) and (3) of the Act and that the company violated Section 8(a)(5) by refusing to bargain and by refusing to carry out its contractual obligations of making welfare fund contributions and remitting union dues to Local 17-18.

John Sanchez was employed by the Company since 1988. He testified that on September 25, 1992, while he was at work, Luis Moreano, a representative of Local 17-18 (who had been given permission to enter the plant), asked him to hand out some leaflets to other employees. According to Sanchez, his supervisor, Daryl, was standing about 20 feet away when Moreano handed him these leaflets. Sanchez states that he then placed the leaflets into a freezer and continued working. He states that at lunchtime, when he went to pick up the leaflets, they no longer were there and that he therefore did not distribute them to any employees.

According to Sanchez, he was told on the following day by plant manager, Jorge Diaz, that he was being suspended. Sanchez asserts that he told Diaz that he thought he was being suspended because of the leaflets but that Diaz merely said that he was suspending Sanchez for 2 days because he had orders to do so.

Both the General Counsel and the attorney for Local 17-18 made valiant efforts to refresh Sanchez' recollection regarding his conversation with Diaz on September 26, 1992, Bogen went so far as to have Sanchez read his pretrial affidavit. But this was to no avail and Sanchez repeatedly testified that Diaz did not say anything about the Union or the leaflets when he told Sanchez that he was being suspended. It was only through the cross-examination by the Company's attorney who began to quote from the affidavit, that I was informed that Sanchez, in his pretrial statement, had said that Diaz had told him that he was being suspended for having taken the leaflets from Local 17-18.

Apart from the absurdity of this allegation, it is obvious that Sanchez who gave a false account of the events to the Board agent during the investigation of this case, was unwilling to lie when he was put under oath and asked to testify in open court. Thus, notwithstanding the failure of the employer to explain its actions in suspending Sanchez, I conclude that no prima facie case was established and I shall recommend that this allegation be dismissed.

According to Douglas Isaacson, the president of Local 17-18, his union has represented employees of Maramont at its Brooklyn facility for about 10 years. The last contract between Local 17-18 and the Company expired on November 20, 1992. Nevertheless, it is obvious that a sizable proportion of the Company's work force has not been satisfied with Local 17-18's representation for a long time as the ILGWU was able to get at least 30 percent of the employees to sign the necessary showing of interest in order to file the initial election petition back in 1987.[2]

According to Isaacson, from July 1992, the Company ceased making contributions to the contractually established Welfare Fund.[3] He states that from the same date, the Company stopped remitting dues to the Union which it was obligated to do in accordance with the checkoff provisions of the contract. In fact, the evidence shows that from July 1992 and until May 31, 1993, the Company kept on deducting dues from the employee's wages but retained the moneys instead of remitting them to Local 17-18.

Isaacson testified that on August 14, 1992, he sent a letter to the Company demanding that the Company resume the dues' remittances and welfare fund contributions. He states that as he received no response, he wrote again on September 10 and 15, 1992, and on January 29, 1993. He states that the Company's only response to each letter was silence. Additionally, the letters dated September 10, 1992, and January 29, 1993, contain demands that the Company commence negotiations with Local 17-18 for a new contract.

Notwithstanding the failure of the Company to make welfare fund contributions from July 1992, the fund decided to continue to cover these employees and to reimburse them for any medical bills that would otherwise have been covered under the welfare plan until June 4, 1993, which was the date of the election.[4]

In the meantime, the Regional Office was holding hearings in relation to the election petition that had been filed by the ILGWU on September 11, 1992. These hearings were held in October and November 1992 and resulted in a Direction of Election which was issued by the Regional Director on April 22, 1993. (As noted above, the Regional Director issued the Direction of Election despite an assertion that the above-described actions by the employer should block the election until a final disposition was made of the unfair labor practice charges filed by Local 17-18; a process which would have taken at least another year.)

In January 1993, Local 17-18 raised its dues from $3 per week to $15 per month. This in turn generated a campaign

[2] I note that the contract between Local 17-18 and the Company sets the standard wage rate at 20 cents an hour over the minimum wage after an employee works for more than 60 days. The contract also provided wage increases of 30 cents an hour as of July 1, 1990, 25 cents an hour as of July 1, 1991, and 25 cents an hour as of July 1, 1992.

[3] Pursuant to the collective-bargaining agreement, the Company was obligated to contribute $3 per employee per week to the Welfare Fund. This amounts to a total of $156 per year per employee. Given the national discussion about the rising costs of health insurance, I am more than a little curious about the level or types of benefits that one can buy for this amount of money.

[4] It appears that on September 24, 1992, Local 17-18 issued a leaflet to the employees stating that the employer had stopped making payments to the Welfare Fund and that if these payments were not received, the employees' health insurance coverage would be terminated. It seems that this notice was first given to the employees by Local 17-18 only after the ILGWU filed its petition. In any event, Bogen stipulated that the Welfare Fund did in fact elect to continue insurance benefits for the employees and he agreed that it is reasonable to assume that his client, Local 17-18 would have notified the employees of this fact as soon as possible.

by the ILGWU to have the employees sign a petition which stated:

> We the undersigned employees of Maramont Corp. give notice that we do not want to be represented for purposes of collective bargaining by Local 17-18, United Production Workers Union. We hereby revoke any and all authority of Maramont to deduct (checkoff) dues, fees or assessments for . . . Local 17-18 from our wages. We hereby resign membership from Local 17-18 immediately.

This petition was in three languages: English, Spanish, and French. The ILGWU organizers who solicited the signatures read and explained the petition to the employees. During the period from January 30 to February 10, 1993, 64 employees signed this petition and I am convinced by the testimony that there is no evidence that the signatures were obtained by fraud, misrepresentation, or coercion.

On February 17, 1993, copies of the petition were hand delivered by the ILGWU to the Company and to the offices of Local 17-18.

Isaacson testified that despite the Company's noncompliance with the dues-checkoff and welfare fund contribution provisions of the contract and notwithstanding the expiration of the contract on November 20, 1992, Local 17-18 nonemployee agents were permitted access to the company premises and employees during 1993.

According to Isaacson, he was contacted in May 1993 by the Company's owner, Harry Reichman, who expressed an interest in negotiating a contract. Accordingly, a meeting was scheduled for May 24, 1993, where Isaacson was accompanied by a negotiating committee of employees which included Simone Rosa, Jean Liffet, and Paulette Vendome. (Note these names will reappear when we discuss the employer's objections.) Isaacson states that the Company was represented by two attorneys, one of whom is an experienced labor counsel named Arthur Kauffman. At this meeting, according to Isaacson, he simply presented the Union's proposals which were reviewed by the other side.

Isaacson testified that another meeting was held on June 1, 1993. He states that at this meeting, the Company stated that it did not wish to negotiate with Local 17-18 because the election was coming up on June 4 and the Company would only be willing to negotiate if Local 17-18 won the election.

In my opinion, the evidence clearly shows that the Company favored Local 17-18 as its choice in the election. Indeed there was unrebutted evidence that the Company's plant manager, Jorge Diaz, distributed Local 17-18 literature to employees before the election. One of these stated:

> To all our members:
>
> This week-end an ILGWU organizer will visit you at your home. They will try to convince you to vote for them this June 4th. ILGWU is desperate. We, Local 17-18 will never disrespect you or invade the privacy of your home. Remember, you don't have the obligation to believe their false promises. Remember, they are desperate. You have to know that at the factories controlled by ILGWU, are closing and its members are looking for jobs. If you vote for them you will be a victim and you will be replaced by one of their old members. Do not trust the future of your job voting for a union—False and not trustworthy, ILGWU—International. Vote ''Local 17-18'' on June 4.

On June 3, 1993, the day before the election, all the employees were gathered together where Harry Reichman delivered a speech that was translated by Jorge Diaz into Spanish and by a hired interpreter into Haitian French. There are conflicting versions of what was said in this speech. The General Counsel presented a number of witnesses (all of whom were ILGWU supporters), who gave their version of what they heard. The Employer, on the other hand, presented some employee witnesses (all of whom were members of Local 17-18's negotiating committee), who testified as to what they heard. The Employer did not call as witnesses either Reichman or the persons who translated for him.

Having reviewed the record, I believe that the following is essentially what was said. Reichman told the employees that he was upset by the ''lies'' that the ILGWU was telling about him and that if they won the election, they could not make him do what he didn't want to do. He told them that he personally would not negotiate with the ILGWU, but would have his partner do the negotiating on the Company's behalf. He said that if the ILGWU called a strike, the striking employees would not get paid when on strike and the Company could and would hire replacements or send the work to another plant that the Company operated. Reichman told the employees that the ILGWU had sent a letter to the city of New York which is a major customer and asked that the city terminate its contract with Maramont. He stated that if the city canceled the contract, the Company would lose business and employees would either lose their jobs or be laid off. At some point during the meeting, Jorge Diaz held up a sample ballot which had an X marked in the box designated for Local 17-18 and told employees to vote this way.

In relation to Reichman's statements regarding the ILGWU's alleged attempt to get the city to cancel its contract, he referred specifically to a letter that he had received on April 1, 1993, from the city's department of human resources which also enclosed a letter to that department from the ILGWU's attorney. What is immediately apparent from these documents is that Reichman's assertion at the June 3, 1993, that the ILGWU had sought a cancellation of Maramont's contract with the city is simply false. Thus, it seems to me that in the June 3 speech, Reichman had raised a false premise on which he elaborated to convey the message that if the employees voted for ILGWU, this would result in the city canceling its contract and employees losing their jobs.

IV. THE OBJECTIONS

With respect to the unfair labor practice allegations made by Local 17-18, the Employer presented no evidence to rebut those claims. Moreover, the Employer presented no reason, justification, explanation, mitigation, or excuse as to why it did what it did. Of course if we make the assumption that people who run or advice companies do in fact have reasons for the way they behave and if we add the presumption that human beings will normally act in their own self-interest, I think that the reasons for the Employer's conduct in this case is not too difficult to ascertain.

It is my opinion that the Company and Local 17-18, having had a cozy relationship for many years, were both fearful that the ILGWU would come in and replace Local 17-18 as the employees' bargaining representative. To this end, the company committed various violations of the Act (for which it could set aside moneys to pay for any potential liabilities), and thereby give Local 17-18 grounds to file unfair labor practice charges against it in an effort to delay any election that could result in Local 17-18 being ousted.[5] And in fact this is precisely what happened as Local 17-18 filed charges and asked that the election proceedings be postponed for however long it took to get a decision on its unfair labor practice charges. When this was unsuccessful and the election went forward, Local 17-18 filed objections to the election citing the same conduct which the company concedes that it committed. Thus, based on this admittedly illegal conduct, Local 17-18 sought to overturn the results of the election which had been won by the ILGWU. When this too failed, and the Regional Director overruled the objections filed by Local 17-18,[6] the only remaining hope was that the objections filed by the Employer would be sustained.[7] Somehow it is not surprising that the only witnesses that the employer brought forth to substantiate its objections happened to be people who were on Local 17-18's negotiating committee.

Jean Liffet (also known as Babu), testified that about 2 weeks before the election he was talking outside the plant with union representative Jean Morriseau who is known by his nickname of Tigus. Liffet asserts that Tigus told him that if the employees did not vote for the ILGWU, then the Immigration would come. On direct examination he testified that after this conversation he told another employee, Jacqueline about it. However, on cross-examination, Liffet asserted that Jacqueline was present when the statement was made by Morriseau. Jacqueline was not called to corroborate or deny this assertion. There was also testimony that Jean Liffet was a heavy midday drinker.

Marie Vendome, who is also known as Paulette Homme, testified that on two or three occasions before the election, Tigus told her and a group of 5 to 10 coworkers that if they voted for the ILGWU, they would get help from that Union if they didn't have papers but if they did not vote for the ILGWU the Union would call the Immigration Service. She testified that this group of workers usually stayed together but she could recall only three of their names, one of which was Simone Rosa who, as noted above, served on the Local 17-18 bargaining committee with Vendome and Liffet.

Simone Rosa also testified about the alleged threat by Morriseau. However, unlike Vendome who placed her at the scene, Rosa stated that she did not actually hear Morriseau make the statement; but that other employees, whose names she couldn't recall, told her that they were told that if they did not vote for the ILGWU, they would be forced out of the country.

Jean Morriseau (Tigus), whose testimony was corroborated by another ILGWU organizer, Milton Jean Baptiste, testified that the subject of Immigration was usually raised by employees to him, in that they expressed fears that if they voted for the ILGWU the company would fire them or cause them to be deported. He testified that he told employees that the ILGWU has an office at 275 7th Avenue, where ILGWU members could, among other things, get free assistance on Immigration matters. He states that he also told them that such assistance would be available when they became members of the ILGWU which would happen if the ILGWU won the election and ultimately was successful in obtaining a contract.

In my opinion, Morriseau and Baptiste credibly denied that they made any threats to call Immigration against any employees or otherwise made any threats to have people deported. I make this finding based on the respective testimony of the people involved and also based on my observation of their demeanor. Accordingly, I shall recommend that the Employer's objections be overruled and that Local 132–98–102 of the ILGWU be certified as the exclusive collective-bar-

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[5] This calls for a brief explanation of the Board's ''blocking charge'' rules. Normally, but not always, the NLRB will postpone an election if there are unresolved unfair labor practice charges pending. This rule is designed to benefit a union which is petitioning the Board for an election as it prevents the union from being forced into an election when there are unremedied unfair labor practices pending. At the same time a petitioning Union is given the option of filing a ''request to proceed'' pursuant to which it may choose to go ahead with the election rather than wait for the outcome of the unfair labor practice proceedings. See NLRB Casehandling Manual, sec. 11730.8 and Morris, *The Developing Labor*, Chapter 10, sec. B.

These rules work fine in a situation where there is only one union involved. However, they do not work very well and are subject to abuse when two unions are vying to represent the same employees. Thus, in a two-union situation, the blocking charge rule can have the perverse result of encouraging an employer to violate the Act. This is because it can reasonably be predicted that upon an employer's commission of an unfair labor practice, the weaker of the two unions will file charges and want to delay the election whereas the other union may want to proceed to the election as soon as possible. Alternatively, the union that loses the election can be counted upon to file objections asserting that the Employer's unlawful conduct should be grounds for holding a new election. Indeed in a worst case scenario, it would be possible, if the Board applied these rules in a rigid manner, for an employer and a losing union to delay, in perpetuity, the certification of that union which a majority of the employees had voted for in a secret-ballot election.

[6] The Regional Director concluded that the conduct alleged by Local 17-18, even if true, would not have had a sufficient impact on the voters to affect the outcome of the election.

[7] This appears to be a pattern. In *Cherry Hill Textiles*, 309 NLRB 268 (1992), a company represented by Ellman committed similar violations vis a vis Local 17-18 which was the incumbent union and represented by Bogen. In that case, the violations were also committed during the pendancy of an election petition filed by the ILGWU. The ALJ, at 271 fn. 2, had this to say about the situation:

> There is nothing in the record, other than the first sentence in the letter, as to why the Respondent suddenly reneged on its assurances to the Union, [Local 17-18], that it would furnish the information requested. Nor does the record reflect any plausible reason for the Respondent's seemingly bizarre pronouncements that it would stop remitting initiation fees and dues to the Union and that it would prohibit union representatives from entering its facilities to police the collective bargaining agreement. These steps may have been taken by the Respondent in connection with a representation case election. An election was scheduled for November 20, 1990 in Case No. 29–RC–7941; the ILGWU had petitioned in that case to oust the Union as the collective bargaining representative of the Respondent's employees. It is speculative that the Respondent stopped remitting dues and denied the Union access as a less than subtle attempt to block the election.

gaining agent of the employees of Maramont in the unit described by the Decision and Direction of Election.

V. DISCUSSION

As found above, I conclude that the 8(a)(3) allegation regarding John Sanchez has no merit and should be dismissed. I have also concluded that the Employer's objections are not premised on any credible evidence and should also be dismissed. Some of the other allegations are more complicated.

A. *The 8(a)(2) and 8(b)(1)(A) Allegations*

In discussing these allegations, certain principles should be kept in mind. First, Section 9(c) of the Act provides a mechanism by which employees can choose to be represented by a labor organization. Moreover, the Act provides this same mechanism pursuant to which employees may, at appropriate times, change from one union to another, or vote not to represented by any labor organization. In accordance with our traditions, the Board has established procedures which result in secret-ballot elections as this is viewed as the best way that employees can exercise choice, free to the extent possible, from undue outside influence. The election process is viewed by the Courts and the Board as the best way of resolving what if any union, a group of employees wants to have as their collective-bargaining representative. See *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1965), and *Aaron Bros*., 158 NLRB 1077 (1966).

Once a union wins a Board-conducted election, it is entitled to an irrebutable presumption of majority status during the year following its certification. This means that the Employer may not withdraw recognition during that period of time and no other union may challenge the winning union's status during that same period. *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

While recognizing that a secret-ballot election is the best method of insuring employee choice, the Act does not preclude a company from voluntarily recognizing a union if at the time of recognition, the Union in fact represents a majority of the employees in an appropriate unit. *Garment Workers Union (Bernhard Altmann) v. NLRB*, 366 U.S. 731 (1961). In *Keller Plastics*, 157 NLRB 583 (1966), the Board held that the Employer did not violate Section 8(a)(2) of the Act by continuing to recognize a union 1 month after it had been granted recognition and after it had lost its majority support. The Board concluded that where the initial grant of recognition had been based on the Union's majority status (albeit without a Board-conducted election), the Union was entitled to an irrebutable presumption of majority status for a reasonable period of time. See *Royal Coach Lines*, 282 NLRB 1037 (1987).[8]

Having obtained recognition, an incumbent union, if it enters into a collective-bargaining agreement with an employer, is entitled to an irrebutable presumption of majority status during the life of the contract. *Hajoca Corp*., 291 NLRB 104 (1988). After the contract expires, the incumbent union is then entitled to a presumption of continued majority support. *Laidlaw Waste System*, 307 NLRB 1211 (1992). This means not only that the Employer may not, without violating Section 8(a)(5) of the Act, withdraw recognition during the life of the contract, but it also means that no rival union may file a petition for an election with the Board during most of the life of the contract. (To the extent that the contract does not exceed more than 3 years in duration.) To balance the interest between labor relations stability and employee free choice, the Board established certain ''contract bar'' rules in *Delux Metal Furniture Co*., 121 NLRB 995 (1958). Without describing all the rules, suffice it to say that where there exists a valid contract between a company and union A, another union will be precluded from filing an election petition for the same group of employees except 90 to 60 days before the expiration of the contract (or if the contract is more than 3 years, 90 to 60 days before the 3-year period), or after the contract expires if no new contract is reached by the Employer and the incumbent union. Similarly, an employer petition (RM) or employee petition (RD) to oust an incumbent union can only be filed within the timeframe described above.

Special problems are presented in situations where there are two unions vying for the affections of one group of employees. It used to be that if an outside union filed a timely petition for an election, the Employer was precluded from continuing to negotiate with the incumbent union for a new contract until and unless it the election. *Shea Chemical Corp*., 121 NLRB 1027 (1958). That rule was changed in *RCA del Caribe*, 262 NLRB 963 (1982), which held that even where a rival union filed a petition and an election was pending, the Employer was obligated to continue to bargain with the incumbent union and to execute a contract if an agreement was reached. (Of course such a contract would become null and void if the rival union won the election and was certified as the exclusive collective-bargaining representative.) Accordingly, the fact that a rival union filed a petition and an election was pending would not, of itself, overcome the incumbent union's presumption of continued majority status.

An incumbent union's presumption of majority status may be challenged by an employer after its contract has terminated and if the Employer can show by a preponderance of the evidence that the Union either has actually lost its majority support or that the employer has objective factors ''sufficient to support a reasonable and good-faith doubt of the union's majority.'' *Laidlaw Waste Systems*, supra. See also *NLRB v. Albany Steel*, 17 F.3d (2d Cir. 1994).[9]

[8] Even if a union was recognized at a time when it did not have actual majority support, if that recognition was granted more than 6 months before any unfair labor practice charge is filed, then the grant of recognition will not be challengeable because of the Act's 6-month statute of limitations at Sec. 10(b). See *Casale Industries*, 311 NLRB 951 (1993).

[9] Inasmuch as the Act permits employers or employees to file election petitions to oust a union, it seems to me that it would be far more efficient, economical and consistent with employee free choice for elections to be the preferred method for resolving such questions instead of having them litigated in the context of an unfair labor practice trial. Although not specifically germane to the present case, it would seem to me that the same principles should be applicable in determining if an employer is required to grant initial recognition in the absence of an election as when an employer is seeking to withdraw recognition from an incumbent union. In *NLRB v Gissel Mfg. Corp*., supra, the Board abandoned the test set out in *Joy Silk Mills*, 85 NLRB 1263 (1949), which asked whether the Employer had a good-faith doubt as to the Union's majority status when it refused to recognize a union. Instead it proposed, and the Court adopt-

From the fact that 64 employees of the Company signed a petition stating that they no longer wanted to be represented by Local 17-18 and the fact that this petition was delivered to the company and Local 17-18 on February 17, 1993, the General Counsel does not simply argue that Maramont could have withdrawn recognition based on a good-faith doubt as to majority status, *but that it was obligated to do so*. She therefore argues that if the evidence shows that the Company and Local 17-18 continued to maintain a collective-bargaining relationship after that date, the Company violated Section 8(a)(2) of the Act and the Union violated Section 8(b)(1)(A) of the Act. Presumably the rationale for this argument is that both parties having obtained knowledge that a majority of the employees no longer wish to be represented by Local 17-18, any continued recognition by the Employer would be with a minority union. I do not agree with the General Counsel's theory for a number of reasons which are described below.[10]

First, although the Employer and Local 17-18 knew as of February 17, 1993 that 64 employees signed a petition stating that they did not want to be represented by that Union, they could not know if those signatures truly represented the desires of all the persons who signed the petition. Signing a petition is easy but is no substitute for a secret-ballot election except where the conditions for holding an election have been tainted by substantial unlawful conduct. Neither the Employer nor Local 17-18 was in a position to ''know'' the circumstances in which each employee signed his or her name. They could not know what if any promises were made. They could not know if an employee signed the petition because it represented his actual feelings or simply his desire to get a solicitor out of his or her house in a tactful manner. They could not know the extent to which employees may have been influenced by peer pressure where solicitations and signatures were obtained in group settings. Indeed the only thing the Employer and the incumbent union could truly know is that these people did in fact sign their names. And this, in my opinion, is not quite the same as ''knowing'' that a majority of the unit employees did not want to be represented by Local 17-18.

The General Counsel and the Charging Party have cited two cases to support their view of the matter. These are *Point Blank Body Armor*, 312 NLRB 1097 (1993), and *S.M.S. Automotive Products*, 282 NLRB 36 (1986). While on point, they are in my opinion, distinguishable from the facts in the present case.

In *Point Blank Body Armor*, the ILGWU filed an election petition to replace another union as the bargaining representative. During the pendancy of the election, a majority of the employees signed and delivered a petition to the Employer and the incumbent union stating that they no longer wanted be represented by that union. Notwithstanding that petition and unlike the instant case, a new collective-bargaining agreement was executed before the election was held. Based on these facts and relying on the decision in *S.M.S. Automotive Products*, the Board concluded that the execution of this new contract was unlawful.

In *S.M.S. Automotive*, supra, the relevant facts were that two outside unions filed petitions for an election which were dismissed because they were filed within the ''insulated period'' within 60 days before the expiration date of the existing contract between the Employer and the incumbent union. Being aware of the Board contract-bar rules, one of the unions obtained signatures from a majority of the work force on a petition stating that they did not want to be represented by the incumbent union. In this respect, this effort was done in an attempt to avoid a situation where the Employer might sign a new contract with the incumbent union which would then bar the outside unions from filing new election petition for another 3 years. When the company did in fact sign a new contract an 8(a)(2) charge was filed against the Employer and an 8(b)(1)(A) and (2) charge was filed against the incumbent union. As recognized by the judge, the facts in that case presented a situation which, in many respects, was sui generis and would result in a substantial injustice if the Board's contract-bar rules were strictly followed. The administrative law judge in a decision adopted by the Board, stated:

> The rules established in *Delux Metal*, affirmed in *City Cab*, 128 NLRB 493 (1960), provide a 60-day insulated period during which the parties to a collective-bargaining contract may negotiate and execute a new or amended agreement without the intrusion of a rival petition. . . . There are situations in which the premise underlying the establishment of the insulated period does not exist. The instant case presents such a situation. Thus, the filing of the UAW and Teamsters petitions in October and November 1979 are some evidence of employee disaffection with their bargaining representative. Efforts to permit the employees to voice their true desires were initiated by the filing of those petitions. They were, of course, barred by the Deluxe Metal rules. Immediately, however, the employees signified the full extent of their disaffection when over two-thirds of them signed the November 15 petition. This act, I conclude, negates the existence of a legitimate or genuine interest of SEIU in pursuing collective-bargaining negotiations. . . . Had SEIU and the Employer given effect to the November 15 petition, it is likely a renewal contract would not have been signed on December 7. At that point, new representation petitions could have been filed. The processing of such petitions presumably would have resulted in a Board-conducted election at a relatively early date. The employ-

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ed a standard whereby an employer's refusal to recognize a union, (having majority support), would only be unlawful (in the absence of an election or in cases where the union lost an election), where the Employer's conduct made the holding of a fair election improbable. After *NLRB v. Gissel*, an employer's good-faith doubt, or lack thereof, became irrelevant in determining if an employer was obligated to recognize a union which was trying to become an incumbent. Via equivalence, it seems to me that the Employer's good faith should be equally irrelevant when determining if its withdrawal of recognition from an incumbent union is either legal or prohibited under the Act. As the Employer (or his employees), has the option of filing a petition for an election if it has a reasonable basis for questioning a union's continuing majority support, it seems to me that the preferred method of resolving the question of representation should be the Board's election processes unless it is shown that the Union's conduct made a fair election an unlikely possibility.

[10] The General Counsel contends that the unit contained 118 employees as of February 17 whereas the Employer contends that there were 138 employees in the unit. In view of my conclusions below, it is not necessary to resolve this difference.

> ees would have made their selection regarding representation. All interested parties would have participated The continuing fomenting of unrest, exemplified by the variety of unfair labor practice charges . . . would have ceased. The net effect of the SEIU-employer activity was to proliferate employee unrest and industrial instability. The situation virtually cries out for a remedy. [Id. at 43.]

It is noted that although the ALJ's decision in *S.M.S.* was issued before the Board's decision in *RCA del Caribe, Inc*., 262 NLRB 963 (1982), the Board stated that this did not affect its decision in the case.

Clearly the facts of the present case are substantially different from those in *S.M.S.* and are not of a type that ''cries out for a remedy.'' The fact is that unlike the *S.M.S.* case, a petition for an election was pending in the present case and there was little danger that it was going to be dismissed based on the Board's contract-bar rules. There was, unlike the *S.M.S.* case, no danger that the execution of a new contract with Local 17-18 would prevent the holding of an election for another 3 years. In fact, none of the compelling reasons which gave rise to the *S.M.S.* decision are present in the instant case and I therefore do not believe that the facts herein justify a departure from the rules set out by the Board in *RCA del Caribe*, supra.

This case is also distinguishable from the cited cases in that the evidence shows that the Employer had in fact withdrawn recognition from Local 17-18 and was no longer bargaining with that Union after its contract had expired. Local 17-18 made demands to bargain on September 10, 1992, and January 29, 1993 which were ignored by the Employer. Although it is true that on May 24, 1993, a meeting was held at which Local 17-18 merely transmitted its contract proposals, the evidence shows that at a follow up meeting on June 1, 1993, the Employer's attorney told Isaacson that the Company would not negotiate with Local 17-18 unless and until it won the election which was scheduled for June 4.

Inasmuch as the evidence shows that the Employer had already withdrawn recognition from Local 17-18, there is, in my opinion, no basis for concluding that the Employer and Local 17-18 had violated the Act by continuing to bargain after receipt of the February 17, 1993 petition.

Finally, as I have already concluded that the objections to the election have no merit, the result of that finding, if sustained, will be that the ILGWU will be certified as the collective-bargaining agent of the employees in question. This will therefore obviate any need for the remedies sought in the 8(a)(2) and 8(b)(1)(A) charges. Thus, with a certification to the ILGWU, any unfair labor practice remedies for the alleged 8(a)(2) and 8(b)(1)(A) violations would become superfluous and unnecessary.

B. *The 8(a)(5) Allegations of Local 17-18*

As noted above, Local 17-18 was the incumbent union having a collective-bargaining agreement that ran from November 20, 1989, to November 29, 1990.

Pursuant to Section 8(d) of the Act, neither party to a collective-bargaining agreement may, during its term, alter, modify, or change the terms of the contract without the consent of the other. Therefore, the Employer's unilateral breach of this contract for the period of time prior to its expiration date, by failing to make contributions to the Union's Welfare Fund and its failure to remit union dues to Local 17-18, constituted violations of Section 8(a)(5) of the Act.

Further, even after the expiration date of a contract, an employer must continue the existing terms and conditions of employment (as represented by the terms of the collective-bargaining agreement), until such time as the parties reach an impasse in bargaining, reach a new agreement modifying those terms, or until the Employer is legally discharged from its obligation to bargain with the Union. *W. A. Krueger Co*., 299 NLRB 914, 915 (1990); *Roman Iron Works*, 292 NLRB 1292, 1293 (1989). This is not true, however, as to the union-security provisions of an expired contract. *Robbins Door & Sash Co*., 260 NLRB 659 (1982); *Tampa Sheet Metal Co*., 288 NLRB 322, 326 fn. 15 (1988). Thus, apart from the union-security provisions of a collective-bargaining agreement, an employer will violate Section 8(a)(5) of the Act if it unilaterally changes the existing terms and conditions of employment even after the collective-bargaining agreement has expired. To this extent, the Employer clearly has violated the Act by failing to make contributions to the Local 17-18 Welfare Fund after November 20, 1992, and until either February 17, 1993, (when the employee petition was sent to the Company) or Local 17-18 or on June 4, 1993 (when the ILGWU won the election).

Although under the cited cases, an employer may, after the expiration of a contract, cease giving affect to the union-security clause and cease checking off union dues from its employees wages, I think that a sound argument is made that if the Employer voluntarily continues to comply with the checkoff provisions of the expired contract, it may not retain the money for itself but should be required to remit such moneys to the Union. I would therefore conclude that an employer violates Section 8(a)(5) of the Act when it deducts union dues from its employees wages after a contract has expired but fails to remit those dues to the Union.

Nevertheless, because Local 17-18 lost the election, it is my opinion that it would not be appropriate, in the present circumstances, and would constitute a windfall to that union to order the Employer to turn the money over to them. Rather, it is my opinion that this money which was withheld from the employees, should go back to the people from whom it was taken.

Finally, the evidence shows that Local 17-18's demands for bargaining, made in September 1992 and January 1993, were met with silence. The Employer has not denied nor explained its lack of reaction to the Union's request for bargaining and in this respect there is no doubt that it violated Section 8(a)(5) of the Act. Because Local 17-18 lost the election, however, and the ILGWU will, as a consequence of this decision, become the certified bargaining representative, it would make no sense to grant a bargaining order in favor of Local 17-18.

C. *The 8(a)(1) Allegations Made by the ILGWU*

These allegations all relate to a speech given by Reichman on the day before the election. Although people gave varying versions of what he said, I have concluded that for the most part, the contents of his speech do not match the alleged violations of the complaint that are attributed to him. Thus, although the complaint alleges that he threatened to lay off employees and give their jobs to other people, the facts show

that he merely said that if there was a strike by the ILGWU, the strikers would not be paid during the time they were on strike and that the Company could hire strike replacements or transfer work to another plant. Also, although the complaint alleges that Reichman stated that he would refuse to bargain with the ILGWU if it won the election, the evidence shows that he merely said that he personally would not meet with the Union, but that his partner would do the bargaining on behalf of the Company.

There was, however, one portion of his speech which I do think constitutes an unlawful threat of reprisal. This was the assertion that employees could lose their jobs as a result of the Union's attempt to have the city of New York cancel a contract with the Company.

There is not always a bright line between a threat of reprisal (such as a threat to close one's plant), and a lawful prediction of economic consequences. In *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969), the Court stated:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefits.'' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 274, fn. 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that ''conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.'' [Citation omitted.]

In the present case, the employees were told that because the ILGWU had asked the city of New York to cancel its contracts with the company, that such action could result in the Employer losing business and employees losing their jobs. The problem with this statement is that it was not a statement based on objective fact but rather one based on a false assertion of fact. While it is true that the Union did ask the city to look into alleged labor violations of the company, it did not ask the city to cancel its contract with Maramont. It therefore is my opinion that the Company used this false assertion in an attempt to frighten its employees into believing that the ILGWU would be responsible for their loss of jobs. In my opinion, this statement went beyond a lawful prediction of economic consequences based on objective fact. On the contrary, I conclude that this statement was an unlawful threat of reprisal, which was violative of Section 8(a)(1) of the Act. See *Mademoiselle Sportswear*, 297 NLRB 272 fn. 2 (1989).

CONCLUSIONS OF LAW

1. By refusing to meet and bargain with United Production Workers Union Local 17-18, the Respondent, The Maramont Corp., has violated Section 8(a)(1) and (5) of the Act.
2. By failing to make contributions pursuant to its contract with Local 17-18 both before and after it expired, the Employer has violated Section 8(a)(1) and (5) of the Act.
3. By failing to remit union dues to Local 17-18 checked off from its employees wages, the Employer has violated Section 8(a)(1) and (5) of the Act.
4. By implicitly threatening employees with the loss of their jobs if they voted for Local 132-98-102 Plastic, Metal, Trucking, Warehouse and Allied Workers' Union, International Ladies Garment Workers Union, AFL–CIO, the Employer has violated Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Except to the extent specifically found herein, no other violations have been committed by any of the parties to this case.
7. The objections to the election are without merit and should be dismissed.

REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Although I have concluded that the Employer has failed to meet and bargain with Local 17-18, I shall not order the Company to bargain with that Union inasmuch as the ILGWU won the election and I have recommended that the objections to that election be dismissed.

For the same reason, I shall not order the Company to make any dues payments to Local 17-18. Rather, I recommend that the Employer reimburse all employees for any dues which it has deducted from their wages and not remitted to Local 17-18 since July 1992.

I shall also recommend that the Employer make any contributions that it was required to make under the collective-bargaining agreement with Local 17-18 until June 4, 1993. Moreover, although, there was evidence that the Welfare Fund continued to cover employees during the time that the Employer ceased payments, I shall recommend that the Employer reimburse any employee (or their family), who having suffered an illness or injury, incurred expenses to the extent that such expenses have not been reimbursed by the Welfare Fund but would nevertheless have been covered by the Welfare Plan.

In the case of payments to the Local 17-18 Welfare Fund, it is recommended that such payments be made with interest to be computed in accordance with the practice set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In the case of all other reimbursements it is recommended that they be made with interest to be computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]